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9  
10 **IN THE SUPERIOR COURT**

11 **STATE OF ARIZONA, COUNTY OF YAVAPAI**

12 STATE OF ARIZONA,

V1300CR201080049

13 Plaintiff,

**MOTION TO QUASH SUBPOENAS  
DUCES TECUM**

14 vs.

**MOTION TO STAY AND PROPOSED ORDER**

15 JAMES ARTHUR RAY,

16 Defendant.

**(The Honorable Warren Darrow)**

17 The State of Arizona, through undersigned counsel, hereby moves to quash Defendant's  
18 subpoenas duces tecum issued to the Coconino Medical Examiner, the Yavapai County Medical  
19 Examiner and other undisclosed emergency responders. The State further moves this Court for  
20 an order staying compliance with the subpoenas until this Court issues its ruling on the State's  
21 Motion to Quash. The reasons in support of this motion are more fully set forth below.  
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## MEMORANDUM OF POINTS AND AUTHORITIES

### FACTS:

On February 10, 2010, in its initial disclosure, the State provided unredacted copies of the Coconino County Medical Examiner's and Yavapai County Medical Examiner's autopsy reports on the three victims in this case. On March 4, 2010, in its first supplemental disclosure, the State provided unredacted copies of the autopsy photographs for each of the three victims. The State also included Verde Valley Fire DR 09-0001546 relating to that agency's response to Angel Valley Retreat on the night of the sweat lodge incident.

On March 15, 2010, in its second supplemental disclosure, the State provided copies of the initial medical records of the 2009 sweat lodge participants that were transported either to Verde Valley Medical Center or Flagstaff Medical Center. Included in the records were the medical records of James Shore and Kirby Brown from Verde Valley Medical Center and records relating to the transport of the bodies to the Yavapai County Medical Examiner's Office. The disclosure also included the initial medical records from Flagstaff Medical Center of Elizabeth Neuman, who was at that time a "Jane Doe" identified as "Quebec, Quebec F134," and reports from Verde Valley Ambulance Company and Sedona Fire relating to the transport of the 2009 sweat lodge participants to the Verde Valley Medical Center.

On March 18, 2010, the Yavapai County Medical Examiner's Office notified the State that they had been served with a Subpoenas duces tecum by Defendant's attorneys and faxed a copy to the State. The Subpoenas duces tecum orders the Medical Examiner to produce at the offices of Thomas K. Kelly by March 29, 2010 "any and all documents, including without

1 limitations, records, memoranda, raw notes, or writings of any kind related to the 10/09/09  
2 autopsy of James Shore (09-340) and Kirby Brown (09-339).”

3         On March 19, 2010, the Coconino County Medical Examiner’s Office notified the State  
4 that they too had been served with a Subpoenas duces tecum by Defendant requesting the same  
5 documents on the autopsy of Elizabeth Neuman. A copy of this Subpoenas duces tecum was  
6 faxed to the State and it also requires compliance by March 29. The two Subpoenas duces tecum  
7 are attached as Exhibits A and B.

9         On March 19, 2010, the State sent a letter to Defendant requesting the immediate  
10 withdrawal of the subpoenas, noting that Arizona Revised Statutes section 13-4071 prohibits the  
11 use of such subpoena to procure discovery in a criminal case. On March 22, 2010, Defendant  
12 responded to the State’s request and refused to withdraw the subpoenas duces tecum. Based on  
13 language in Defendant’s letter, the State believes Defendant has issued similar subpoenas to the  
14 Verde Valley Medical Center, Flagstaff Medical Center and the other emergency responders  
15 involved in this case.

17 **LEGAL ARGUMENT:**

18 1. The State has standing to object to the subpoenas duces tecum

19         The State has standing to request that the Court quash the subpoenas duces tecum on two  
20 grounds: (1) the State is a party to the criminal proceeding and has standing to object to the  
21 misuse of the rules and statutes; and (2) the state agencies that have been subpoenaed are  
22 agencies under the control of the State within the meaning of Rule 15, Ariz. R. Crim. P.

24         As the prosecutor in this matter, the State has the right to ensure that the parties comply  
25 with the statutes and rules governing the processing of the criminal case. When attorneys for the  
26

1 defendant engage in activities that constitute an end-run around the Rules of Criminal Procedure  
2 with respect to discovery, the State has the right to object to such conduct.

3 Rule 15 of the Arizona Rules of Criminal Procedure sets out the procedure by which  
4 information and evidence relating to the State's case is provided to the defendant. The Rule  
5 obligates the State to provide information in the possession or control of the State and all persons  
6 who have participated in the investigation or evaluation of the case and who are under the  
7 prosecutor's direction or control. Rule 15 states:

9 **f. Disclosure by Prosecutor.** The prosecutor's obligation under this rule extends to  
10 material and information in the possession or control of any of the following:

11 (1) The prosecutor, or members of the prosecutor's staff, or,

12 (2) Any law enforcement agency which has participated in the investigation of the  
13 case and that is under the prosecutor's direction or control, or,

14 (3) Any other person who has participated in the investigation or evaluation of the  
15 case and who his under the prosecutor's direction or control.

16  
17 The Committee Comment to the 1993 Amendment provides:

18 The 2003 amendment to Rule 15.1(f) is intended to more clearly define the  
19 prosecutor's obligation to obtain and disclose material and information to the  
20 defense. The prosecutor is deemed responsible for obtaining and disclosing  
21 material and information held by state, county, and municipal law enforcement  
22 agencies that have participated in the investigation of the case. See *Carpenter v.*  
23 *Superior Court in and For County of Maricopa*, 176 Ariz. 486, 862 P.2d 246 (App.  
24 *1993*). The prosecutor is not generally deemed responsible for disclosure of  
25 information and material held by federal law enforcement agencies, See *State v.*  
26 *Briggs*, 112 Ariz. 379, 542 P.2d 804 (1975), nor crime victims, see *State v. Piper*,  
113 Ariz. 390, 555 P.2d 636 (1976), nor other lay witnesses, see *State v. Kevil*, 111  
Ariz. 240, 527 P.2d 285 (1974). However, the court may order the prosecutor to  
obtain and disclose information and material covered by Rule 15.1(a) that is not  
within the state's possession and control if (1) the state has better access to the  
information; (2) the defense shows that it has made a good faith effort to obtain the

1 information without success; and (3) the information has been specifically  
2 requested by the defense.

3 In State v. Briggs, 112 Ariz. 379, 383, 542 P.2d 804, 808 (Ariz. 1975), the Arizona Supreme  
4 Court interpreted the obligation under Rule 15 as follows: "The prosecution must provide  
5 evidence which is material to either guilt or innocence, or punishment where the evidence is in  
6 possession or control of the prosecutor or members of his staff, or 'of any other persons who  
7 have participated in the investigation or evaluation of the case and who are under the  
8 prosecutor's control.' Rule 15.1(d), Rules of Criminal Procedure."  
9

10 The county medical examiner offices are political subdivisions of the State. The Medical  
11 Examiner is statutorily obligated to perform autopsies when requested by the county attorney or  
12 superior court. A.R.S. § 11-597(C) (If the county attorney or a superior court judge of the county  
13 where the death occurred requests an autopsy, the county medical examiner shall perform the  
14 autopsy . . . ."). In this case, the Medical Examiners for both Yavapai County and Coconino  
15 County participated in the investigation by performing the autopsies. As such, each medical  
16 examiner is a person "who has participated in the investigation or evaluation of the case and who  
17 is under the prosecutor's direction or control." Clearly, the State has standing to object to the  
18 Defendant's use of subpoenas duces tecum to obtain discovery in this case.  
19

20 2. The Defendant Cannot Use the Subpoena Powers of the Court to Circumvent Rule 15.1  
21

22 Rule 15.1 of the Arizona Rules of Criminal Procedure governs discovery requests in all  
23 criminal cases. If a defendant seeks information not disclosed by the State, he must either direct his  
24 request to the prosecutor or file a motion with the trial court pursuant to Rule 15.1(g) seeking the  
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1 additional information. *Carpenter v. Superior Court In and For County of Maricopa*, 176 Ariz. 486,  
2 862 P.2d 246 (App. 1993).

3 The defendant triggers the criminal discovery process encompassed in Rule 15,  
4 however, when he attempts to use the court's subpoena power to order production  
5 of materials or information. Once the defendant elects to utilize the court's  
6 authority to obtain records, he must do so according to the rules adopted by the  
7 Arizona Supreme Court.

8 Petitioners attempted to use the court's authority without complying with the  
9 applicable rules of procedure. They did not request that the prosecutor disclose  
10 the police reports under Rule 15.1.e<sup>1</sup>; they did not notify the state that they had  
11 subpoenaed PPD to disclose the reports. We conclude therefore that the trial  
12 court properly quashed petitioner's subpoenas duces tecum.

13 *Id.* at 491, 862 P.2d at 251. The *Carpenter* case also addresses records that are not specifically under  
14 the prosecutor's control. "Under Rule 15.1.e<sup>1</sup>, the court can order "any person" to make available  
15 needed materials or information, assuming a defendant makes the showing required by the terms  
16 of the rule. . . We therefore conclude that, even if the information this defendant sought is not  
17 encompassed within the mandatory disclosure provisions of Rule 15, the rules provide an  
18 adequate means for obtaining needed information." *Id.* at 490-491, 862 P.2d at 250 – 251.  
19 (internal citations omitted).

20 Arizona Revised Statutes § 13-4071 governs the issuance of subpoenas in criminal cases.  
21 Section 13-4071(D) provides procedures for a defendant to obtain blank subpoenas for witnesses  
22 required by the defense; however, the statute specifically *prohibits* a defendant from using this  
23 provision for discovery in a criminal case, "including to access the records of a victim." ("Blank  
24 subpoenas shall not be used to procure discovery in a criminal case, including to access the  
25 records of a victim." A.R.S. § 13-4071(D))

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26 <sup>1</sup> This provision is now found in Rule 15.1(g), Ariz. R. Crim. P.

1 This is exactly what Defendant is attempting to do in this matter. Not only has Defendant  
2 failed to comply with any of the formal discovery tools set forth in Rule 15, his actions in obtaining  
3 blank subpoenas from the Court in order to acquire medical records of the victims in this matter is in  
4 direct violation of A.R.S. § 13-4071(D).

5  
6 3. State's Request for Stay

7 The compliance date set forth by Defendant in the two subpoenas duces tecum to the  
8 Medical Examiners is March 29, 2010. The State therefore requests this Court to stay the  
9 compliance with the subpoenas duces tecum pending a ruling on the State's Motion to Quash.  
10 Rule 45(a)(D), Ariz. R. Civ. P., provides that a party who objects to a subpoena does not need to  
11 comply with it until a court orders compliance. *Stewart v. Superior Court*, 163 Ariz. 227, 231  
12 n.3, 787 P.2d 126, 130 (App. 1989) (noting that "[o]ur supreme court has long held that, in the  
13 absence of an applicable criminal rule, criminal courts may look to the civil rules for a definition  
14 of their powers, insofar as the rules of civil procedure codify the powers of the court at common  
15 law.")

16  
17 **CONCLUSION:**

18 As noted in the facts set forth above, the State has complied and will continue to comply  
19 with its disclosure obligations pursuant to Rule 15, Ariz. R. Crim. P., and will certainly provide  
20 to Defendant any additional records that fall within the Rule or as ordered by the Court. In fact,  
21 much of the material apparently sought by Defendant's subpoenas duces tecum has already been  
22 disclosed to Defendant. Notwithstanding the State's efforts, Defendant has ignored the  
23 procedures set forth in Rule 15 and violated the prohibition set forth in A.R.S. § 13-4071(D) in  
24 issuing subpoenas duces tecum for the autopsy records, medical records and emergency  
25  
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1 responder records relating to the treatment and/or examinations of the victims. Accordingly, the  
2 subpoenas duces tecum served on the Coconino County Medical Examiner, the Yavapai County  
3 Medical Examiner and any and all other subpoenas duces tecums served by Defendant should be  
4 quashed by this Court. Finally, the State requests this Court to stay compliance with any issued  
5 subpoenas pending its ruling on the State's Motion to Quash.  
6

7 RESPECTFULLY submitted this 25<sup>th</sup> day of March, 2010.  
8  
9

10 By Sheila Sullivan Polk  
11 SHEILA SULLIVAN POLK  
12 YAVAPAI COUNTY ATTORNEY  
13

14 **COPIES** of the foregoing emailed this  
15 25<sup>th</sup> day of March, 2010, to:

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**COPIES** of the foregoing delivered this  
25<sup>th</sup> day of March, 2010, to

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11 SUPERIOR COURT OF STATE OF ARIZONA  
12 COUNTY OF YAVAPAI

13 STATE OF ARIZONA,

14 Plaintiff,

15 vs.

16 JAMES ARTHUR RAY,

17 Defendant.

CASE NO. VCR1300CR201080049

SUBPOENA DUCES TECUM

(Coconino Medical Examiner)

1 THE STATE OF ARIZONA to:

2 COCONINO OFFICE OF THE MEDICAL EXAMINER

3 Custodian of Records

4 2500 North Fort Valley Road

5 Flagstaff, Arizona 86001

6  
7 YOU ARE HEREBY ORDERED TO PRODUCE to the Law Firm of Thomas K. Kelly at  
8 425 E. Gurley, Prescott, Arizona 86301, on or before March 29, 2010, by 5:00 p.m., the  
9 following items:

10 Any and all documents, including without limitations,  
11 records, memoranda, raw notes, or writings of any kind,  
12 related to the 10/19/09 autopsy of LIZBETH MARIE  
13 NEUMAN (09-446).

14  
15 Disobedience of this subpoena constitutes contempt of court is so punishable.

16  
17 DATED: March 16, 2010

18 By: 

19 CLERK OF THE SUPERIOR COURT  
20

21 RETURN OF SERVICE:

22 I hereby certify that I served a copy of the above subpoena on the \_\_\_\_ day of March, 2010,  
23 upon \_\_\_\_\_, by showing the original to that person and  
24 informing him/her of the contents thereof.  
25  
26  
27  
28

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11 SUPERIOR COURT OF STATE OF ARIZONA  
12 COUNTY OF YAVAPAI

13 STATE OF ARIZONA,  
14 Plaintiff,  
15 vs.  
16 JAMES ARTHUR RAY,  
17 Defendant.

CASE NO. VCR1300CR201080049

SUBPOENA DUCES TECUM

(Yavapai County Medical Examiner)

1 THE STATE OF ARIZONA to:

2 YAVAPAI COUNTY OFFICE OF THE MEDICAL EXAMINER

3 Custodian of Records

4 980 Division Street

5 Prescott, Arizona 86301

6  
7 YOU ARE HEREBY ORDERED TO PRODUCE to the Law Firm of Thomas K. Kelly at  
8 425 E. Gurley, Prescott, Arizona 86301, on or before March 29, 2010, by 5:00 p.m., the  
9 following items:

10 Any and all documents, including without limitations,  
11 records, memoranda, raw notes, or writings of any kind,  
12 related to the 10/09/09 autopsy of JAMES SHORE (09-340)  
13 and KIRBY BROWN (09-339)

14  
15 Disobedience of this subpoena constitutes contempt of court is so punishable.

16  
17 DATED: March 16, 2010

18 By: 

19 CLERK OF THE SUPERIOR COURT

20 RETURN OF SERVICE:

21 I hereby certify that I served a copy of the above subpoena on the \_\_\_ day of March, 2010,  
22 upon \_\_\_\_\_, by showing the original to that person and  
23 informing him/her of the contents thereof.